bar the beneficiaries.[13] If the statute gives a new, independent cause of action, it is certainly anomalous to permit the deceased to release or discharge a claim which does not belong to him and which does not accrue until his death. In breaking away from the confining interpretation generally put upon these remedial enactments, the principal case seems to reach a logical and satisfactory result.

LIMITATIONS UPON A STATE'S JURISDICTION OVER FOREIGN CORPORATIONS. — A recent decision of the Supreme Court of the United States [1] raises again the problem as to the nature of the jurisdiction which a state has over a foreign corporation. *Simon* v. *Southern Ry. Co.*, 236 U. S. 115. A judgment against such a corporation had been obtained on a cause of action arising outside the state under a state statute providing for service of process on the secretary of state when there had been a failure to designate a proper agent to receive it. This method of obtaining jurisdiction was held to be in violation of the constitutional guaranty of due process of law.

It is the theory of the common law that a corporation cannot exist beyond the confines of the jurisdiction which created it. A state can therefore never obtain personal jurisdiction over a foreign corporation by means of its actual presence in the state, and must gain control if at all by some other method. Since a state has the power in general to prevent such a corporation from engaging in business within its borders,[2] *a fortiori*, it may impose conditions upon it which it must accept before it can act legally within the state.[3] There are no limitations, other than possible constitutional ones, which will be discussed later, upon the restrictions which may thus be made.[4] So the states have usually provided by statute that a corporation must consent to be sued in the courts of the state as a condition precedent to entrance, and consent is of course as good as actual presence as a foundation for jurisdiction *in personam*.[5] If the corporation sends no regular agents to do business,

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of the deceased's estate will not bar a recovery by the next of kin. This is a necessary recognition that an entirely new right is created. Spradlin *v.* Georgia Ry. & Electric Co., 139 Ga. 575, 77 S. E. 799; Rowe *v.* Richards, 32 S. D. 66, 142 N. W. 664; Mahoney Valley Ry. *v.* Van Alstine, 77 Oh. St. 395, 83 N. E. 607.

[13] Southern Bell Telephone & Telegraph Co. *v.* Cassin, 111 Ga. 575, 36 S. E. 881; Michigan *v.* Boyne City, G. & A. R. R. Co., 141 N. W. 905 (Mich.); State *v.* United Railway & Electric Co. of Baltimore, 121 Md. 452, 88 Atl. 229. See 14 HARV. L. REV. 296. TIFFANY, DEATH BY WRONGFUL ACT, § 124. The Georgia court reaches this result, although holding that a recovery by the estate under the survival statute will not bar the action by next of kin. *Cf.* Spradlin *v.* Georgia Ry. & Electric Co., 139 Ga. 575, 77 S. E. 799. This result is all the more extraordinary, because the Georgia statute does not require that the deceased could have recovered if death had not ensued. GA. CODE, 1910, § 4424.

[1] A statement of the facts of this case will be found on p. 815 of this number of the REVIEW.

[2] Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28.

[3] Paul *v.* Virginia, 8 Wall. (U. S.) 168.

[4] BEALE, FOREIGN CORPORATIONS, § 121.

[5] Copin *v.* Adamson, L. R. 9 Ex. 345. See for a typical recent case, W. J. Armstrong Co. *v.* New York Central, etc. Co., 151 N. W. 917 (Wis.).

there is no foundation for this consent.[6] But when agents are sent, it consents as a matter of fact to the conditions imposed by the state law and will be bound by them.[7] When according to statute an agent to receive process is named, or, although not named, is regularly present, engaged in the corporation's business, service on such a person is sufficient.[8] The courts have held in such cases that suit may be brought on any transitory cause of action irrespective of whether it arises within or without the state.[9] This shows that consent to jurisdiction, if once properly given, may cover a broader field than cases arising out of the business done in the state.[10]

But in the principal case, where service was by statute made on the secretary of state because of the corporation's failure to name an agent, the court held that such service was unconstitutional as to causes of action arising outside the state, although intimating that the contrary result would follow had the cause arisen in the state. To be sure, if the statutory condition of entrance, requiring submission to such process, brought about a deprivation of the constitutional rights of the corporation, the provision might be invalid. Thus a foreign corporation cannot validly agree not to bring actions in a federal court in return for the privilege of doing business in the state.[11] There have been *dicta* to the effect that "a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law." [12] If for the sake of argument it is admitted that there is such a limitation on a state's excluding power, nevertheless the principal case does not fall within it. As the corporation by voluntarily entering the state has actually consented to the provisions of the existing statute for serving process, true jurisdiction over it *in personam* is acquired,[13] and it is far different from its waiving in advance its constitutional rights and thus having its property later taken without jurisdiction or due process.

The principal case therefore seems incorrect if it stands for the proposition that there is actual consent if the corporation designates agents in

[6] St. Clair *v.* Cox, 106 U. S. 350; for a full discussion of what constitutes "doing business" in a state, see BEALE, FOREIGN CORPORATIONS, ch. 8.

[7] Mutual Reserve Ass'n *v.* Phelps, 190 U. S. 147. Consent in fact is based on reasonable impressions gained from the acts of the parties rather than on actual mental condition. The corporation does the act of entering the state to do business, the act which the state has said signifies consent to jurisdiction, and having done this act, has consented. See BEALE, FOREIGN CORPORATIONS, § 74.

[8] Moch *v.* Virginia Fire, etc. Co., 10 Fed. 696.

[9] Barrow Steamship Co. *v.* Kane, 170 U. S. 100. See Edward Quinton Keasbey, Esq., in 12 HARV. L. REV. 1.

[10] Of course, in each case it is a question of construing the state statute to determine just what the foreign corporation has agreed to do. In the principal case, the statute clearly covered both local and foreign causes of action. In the former Louisiana statute on the subject (set out in 31 So. 175) the jurisdiction of the state courts was strictly limited to causes arising in the state. In the light of this former limitation the general words of the present statute are properly construed to cover all causes of action arising within or without the state. In Old Wayne, etc. Ass'n *v.* McDonough, 204 U. S. 8, relied on in the principal case, the talk of the court, which was probably a *dictum*, was directed towards a statute which was much narrower in terms, and the case can only be cited properly on the grounds of statutory construction. See 20 HARV. L. REV. 572.

[11] See 28 HARV. L. REV. 304.

[12] Day, J., in Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 83.

[13] See footnotes 5 and 7, *supra*.

pursuance of the statute or, even though it fails to, if service is made on its agents, — while there is no consent if service is made on a state officer. Indeed the court seems to assume that actual consent does exist, for it intimates that such service would be proper for actions arising in the state. There is no logical reason why the consent is not to the full extent of the statute.[14] Or if the Supreme Court means that there is no real consent to jurisdiction and that it is therefore contrary to due process, how may the corporation be made by the state to waive its constitutional rights as to domestic and not as to foreign causes? On either view the result is inconsistent, and means that the corporation is excused from paying the full agreed price for a privilege granted.

LOSS CAUSED BY FEDERAL SHIFTING OF HARBOR LINES. — It is not uncommon to be startled by the outcome of particular litigation when it is looked at apart from the close logic or compelling policy that underlies it. Such is the case with regard to a recent expression by the Supreme Court of the United States on the question of federal control over navigable waters. *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251. The plaintiff sought to enjoin the Secretary of War from destroying without compensation a wharf which he had built in conformity with the state and with the later established federal harbor line, but which had become an obstruction to navigation under the harbor line as now changed by the War Department. The relief was denied.[1]

At first thought this result seems altogether shocking. Instead of stimulating commerce by the fixing of a harbor line, the government may find itself in the position of deterring development along the waterfront. Investors will not dare risk their capital if they must act at the peril of seeing it become a total loss when the Secretary of War changes his mind. Nevertheless the decision seems analytically correct. Sovereign powers that affect the welfare of the public cannot become the subject of grant. Congress can no more by estoppel clog its power to regulate commerce, than a state can contract away its police power. Whenever the executive in a *bonâ fide* exercise of its discretion alters the harbor line to meet the requirements of navigation, it must remove all obstructions that come within it. No structure can be erected that is not subject to the public easement of passage, and removing an obstruction cannot be a *taking* in the forbidden sense.

Even were the question debatable on principle, there is a coherent line of authority which would make the present decision inevitable. It was early settled that under its power to regulate commerce Congress may at any time assume control of all navigable waters that are accessible

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[14] Thus, if the statute is clear, the service may be had even after the corporation has ceased to do business in the state. See 19 HARV. L. REV. 52. The same is true if the cause arises in the state, but not in the course of any of the corporation's regular state business. American Casualty Ins. Co. *v.* Lea, 56 Ark. 539, 20 S. W. 416.

[1] Lamar, J., dissenting. For a more complete statement of facts, see p. 814 of this issue.